No. 14-462

IN THE

Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL, SECOND DISTRICT

RESPONDENTS' SUPPLEMENTAL BRIEF

F. Edie Mermelstein
LAW OFFICES OF
F. EDIE MERMELSTEIN
18811 Huntington Street,
Suite 240
Huntington Beach, CA 92648

Paul D. Stevens
MILSTEIN ADELMAN, LLP
2800 Donald Douglas Loop N.
Santa Monica, CA 90405

Ingrid Maria Evans
EVANS LAW FIRM, INC.
3053 Fillmore St. #236
San Francisco, CA 94123

Thomas C. Goldstein
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

Harvey Rosenfield
Pamela Pressley
CONSUMER WATCHDOG
2701 Ocean Park Blvd.,
Suite 112
Santa Monica, CA 90405

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

RESPONDENTS' SUPPLEMENTAL BRIEF

Respondents submit this supplemental brief to address the California Supreme Court's decision in *Sanchez v. Valencia Holding Co., LLC*, 2015 Cal. LEXIS 5292 (Cal. Aug. 3, 2015) (*Sanchez*). Petitioner's Reply Brief acknowledges *Sanchez*, but cites it only in a parenthetical with a "*cf.*," describing the decision as merely holding that the Federal Arbitration Act (Act) "preempts the prohibition on class action waivers in California's Consumer Legal Remedies Act." Reply Br. 12. That characterization is substantially incomplete.

The parties in *Sanchez* entered into an arbitration agreement governed by California law. The agreement contained a class-action waiver, accompanied by a non-severability clause providing: "If a waiver of class action rights is *deemed or found unenforceable* for any reason . ., the remainder of this Arbitration Clause shall be unenforceable" (emphasis added). A California statute prohibits class action waivers. The plaintiffs accordingly argued that the waiver was unenforceable, rendering the arbitration agreement in turn unenforceable under the contract.

The Court in *Sanchez* applied *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), to hold that the Act preempts the state law prohibition on class action waivers. In turn, *Sanchez* rejected the plaintiffs' argument that the arbitration agreement was unenforceable. Interpreting the specific language of the non-severability clause, the Court concluded: "Rather, the provision is most reasonably interpreted to permit the parties to choose class litigation over class arbitration in the event that the class waiver *turns out to be legally invalid*." 2015 Cal. LEXIS 5292, at *42-*43 (emphasis added). The Court ruled that the

class action waiver was not "legally invalid" because the relevant state law was preempted under *Concepcion*. Accordingly, the non-severability clause was not triggered and the arbitration provision was enforceable under the terms of the parties' contract. *Id.*[1]

The ruling in *Sanchez* tracks respondents' position precisely. As in *Sanchez*, the contract in this case (in Section 9) contains an arbitration provision and a class action waiver. Also as in *Sanchez*, the agreement contains a non-severability clause. But the language of the clause in this case differs critically from the provision in *Sanchez*. The clause states: "If, however, *the law of your state would find* this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable" (emphasis added). Interpreting that language, the California Court of Appeal held that the determination of what "the law of your state would find" – as opposed to whether the waiver would be "deemed or found enforceable" – looks to the

---

[1] Moreover, it did so as a matter of state contract interpretation – not, as petitioner would have it, based on any presumption in favor of arbitration imposed by the Act. *See also Chorley v. Dickey's Barbeque Restaurants, Inc.*, 2015 U.S. App. LEXIS 13652 (4th Cir. Aug. 5, 2015) (intervening Fourth Circuit ruling: Contractual provision at issue "is not a *state law* prohibiting arbitration. Rather, it is a *contractual provision* prohibiting arbitration. And it is generally well-settled that when a 'party to a contract voluntarily assumes an obligation to proceed under certain state laws, traditional preemption doctrine does not apply to shield a party from liability for breach of that agreement." (citation omitted)).

requirements of California law without the preemptive effect of the Act. Because that California law prohibits class action waivers, the Court of Appeal held that Section 9's arbitration provision was unenforceable pursuant to the contract's own terms.

The ruling in *Sanchez* also supports respondents' view that the appropriate disposition may be to dismiss the petition as improvidently granted. If this case had any ongoing significance before *Sanchez*, it no longer does. Petitioner's contention that the California courts are seeking to avoid this Court's ruling in *Concepcion* lacked merit to begin with, and is now demonstrably false.

Further, respondents' Opening Brief explained – and petitioner notably does not dispute – that the non-severability clause at issue in this case is distinct and virtually unique. It is not employed by any other Fortune 500 company, or even by petitioner any longer. Rather, petitioner and other companies frequently use language like that employed in *Sanchez* that refers more generally to whether a court would deem the class action waiver to be invalid – a question that accounts for whether the court would deem the Act to preempt a state law prohibition on such a waiver. Respondents' opening brief explained that in cases arising from such contract language, an arbitration agreement is enforceable. *See* Br. 35-37.

The California Supreme Court held just that in *Sanchez*, under which the arbitration agreements of every other substantial company – and now even petitioner – are enforceable. The contrary result in this case owes purely to petitioner's own choice – for a brief period – to employ distinct language that turns on what "the law of [the customer's] state would find."

An inferior California court's construction of this unique language under state law does not merit this Court's attention. Moreover, as respondents' brief explained, Br. 43-44, non-severability clauses have essentially no prospective significance because under this Court's recent precedents companies can expressly prohibit class action arbitration (*Concepcion, supra*) or achieve the same result by not discussing the issue at all (*Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010)).[2]

Respectfully submitted,

F. Edie Mermelstein
LAW OFFICES OF
F. EDIE MERMELSTEIN
18811 Huntington Street,
Suite 240
Huntington Beach, CA 92648

Paul D. Stevens
MILSTEIN ADELMAN, LLP
2800 Donald Douglas Loop N.
Santa Monica, CA 90405

Ingrid Maria Evans
EVANS LAW FIRM, INC.
3053 Fillmore St. #236
San Francisco, CA 94123

Thomas C. Goldstein
Counsel of Record
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tg@goldsteinrussell.com

Harvey Rosenfield
Pamela Pressley
CONSUMER WATCHDOG
2701 Ocean Park Blvd.,
Suite 112
Santa Monica, CA 90405

---

[2] Respondents apologize for an error in their opening brief, which states: "in *Stolt-Nielsen*, the Court refused to override an arbitrator's determination that the parties' agreement authorized class-wide arbitration, rejecting the assertion that such a construction was contrary to principles embodied in the Act." Br. 29. The sentence should have referred to *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), not *Stolt-Nielsen*.